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No. 90-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNION BANK,

Petitioner,

v.

HERBERT WOLAS, Chapter 7 Trustee
for the Estate of ZZZZ BEST CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE* SUPPORTING REVERSAL

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This brief is in support of reversal and is filed pursuant to Rule 37.3 with the consent of all parties.

Interest of *Amicus Curiae*

The New York Clearing House Association (the "Clearing House") is an association of 12 leading commercial banks in the City of New York.[1] The Clearing

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers (continued...)

House regularly appears as *amicus curiae* in cases raising significant questions of law relating to banking. The Clearing House banks are among this country's largest consumer and commercial lenders, with more than $346 billion in domestic loans outstanding. The Clearing House banks have a substantial interest in the consistent application of a rational set of criteria to determine whether regularly scheduled payments of interest or principal on those loans are preferences under the Bankruptcy Code.

In the decision below, the Court of Appeals held that payments of interest and loan commitment fees on an eight-month revolving credit loan were preferential transfers under 11 U.S.C. § 547(b) and that the payments were not subject to the exemption from avoidance applicable to payments of indebtedness incurred and repaid in the ordinary course of the debtor's and lender's business or financial affairs under 11 U.S.C. § 547(c)(2). In determining that the payments were not subject to the ordinary course exemption, the court applied a *per se* rule that interest payments on long-term debt are not made in the ordinary course of business and held without discussion that for purposes of this rule an eight-month revolving credit loan is a long-term debt.

In deciding this case, the Ninth Circuit followed its prior decision in *CHG International, Inc.* v. *Barclays Bank (In re CHG International, Inc.)*, 897 F.2d 1479 (9th Cir. 1990). There, the Court of Appeals held that "long-term" debt—which it did not define—could not be incurred in the

[1](...continued)
Hanover Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

ordinary course of a debtor's business or financial affairs. 897 F.2d at 1486. The court did not refer to any statutory or other support for this rule, but simply asserted without authority that section 547(c)(2) applies only to payments to trade creditors and other short-term creditors. In the present case, the Court of Appeals refused even to consider whether Petitioner's eight-month revolving credit line had been incurred in the ordinary course of the debtor's business or financial affairs. *Wolas* v. *Union Bank (In re ZZZZ Best)*, 921 F.2d 968, 969 (9th Cir. 1990). The use of such arbitrary, *per se* rules in applying the ordinary course exemption will result in unfairness to commercial lenders and artificial and uneconomical restrictions on the availability of credit to borrowers.

Summary of Argument

The section 547(c)(2) "ordinary course" exemption from avoidance of otherwise preferential transfers does not on its face distinguish among types of credit or contain any *per se* rules for determining whether a debt was incurred and paid in the "ordinary course of business or financial affairs." Congress eliminated the statute's only *per se* rule in 1984 when it deleted the requirement that repayment occur within 45 days after the debt was incurred. The Ninth Circuit's attempt to create new *per se* categories of debt ineligible for the exemption is inconsistent with the plain language, legislative history and purpose of the statute.

The preference provisions of the Bankruptcy Code are intended to ensure an equitable distribution of the debtor's estate by authorizing avoidance of certain transfers made on the eve of bankruptcy that have the effect of favoring one creditor over another. This assurance of equitable distribution encourages creditors to continue dealing with a troubled debtor and discourages a rush to demand repay-

ment. The special exemption for payments made in the "ordinary course" is a key element of the preference provisions of the Code because it assures creditors meeting the ordinary credit needs of the borrower that payments made to them in the manner originally agreed will not be subject to avoidance.

Creation of a *per se* rule excluding all payments on long-term debt from the "ordinary course" exemption creates arbitrary distinctions and incentives for banks and other creditors to act in ways contrary to the policies underlying the preference provisions. If potential long-term lenders know that they will automatically be denied the benefit of the "ordinary course" exemption, they will be discouraged from providing the long-term credit debtors need for financial stability and, in many cases, more flexible and less expensive financing. The consequence will be to increase the frequency of liquidity crises for individual and corporate borrowers and to decrease the flexibility and increase the cost of credit. Moreover, existing long-term lenders will have less incentive to work with the debtor in restructuring debt or to continue to provide credit. Long-term creditors instead will be encouraged to withdraw credit and recover principal as soon as the debtor encounters financial difficulty in order to avoid having repayments fall within the preference period.

Section 547(c)(2) does not require that payments on long-term debt be treated in a manner that results in behavior so manifestly at odds with the goals of the Bankruptcy Code. The Ninth Circuit's *per se* rule, and indeed any *per se* rule for applying the ordinary course exemption, should be rejected.

ARGUMENT

I.

The Language of Section 547(c)(2) Creates No Distinctions Among Types of Credit Arrangements in Determining Whether a Debt Was Incurred and Payment Was Made in the Ordinary Course.

Section 547(c)(2) by its terms draws no distinctions between the types of debt that qualify for or are excluded from the ordinary course exemption, nor does the language suggest that the courts should create arbitrary categories of exclusion or inclusion. Rather, section 547(c)(2) requires a determination of whether, in the circumstances presented, the debt was created and the payment made "in the ordinary course of business or financial affairs" of the debtor and lender.[2] This is plainly a fact-based standard not susceptible to *per se* rules.

The approach adopted by the Ninth Circuit in this case would require that the courts arbitrarily categorize the numerous and evolving types of credit based solely on the term of the debt, without reference to the "ordinary course"

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[2] Section 547(c)(2) provides:

"The trustee may not avoid under this section a transfer—

". . . .

"(2) to the extent that such transfer was—

"(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

"(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

"(C) made according to ordinary business terms."

determination mandated by section 547(c)(2). The courts would be required to decide whether the line between "long-term" and "short-term" occurs at 30 days, 90 days, 180 days, 240 days or some other point, and to do so without any statutory guidance or any reference to the business or financial affairs of the specific debtor. This refusal to take into account the precise facts that Congress prescribed as the criteria for applying section 547(c)(2) would only frustrate the policy of exempting ordinary course payments from attack as preferences.

The approach taken by the Ninth Circuit fails to recognize that long-term debt is a common component of the capital structure of most corporate debtors, *see* V. BRUDNEY & M. CHIRELSTEIN, CORPORATE FINANCE 133-34 (3d ed. 1987). Long-term debt finances the purchase of facilities and equipment and provides general corporate funds and working capital. Debtors may incur long-term debt frequently (*e.g.*, to finance office equipment) or infrequently (*e.g.*, by issuing publicly traded debentures). All of these borrowings serve the debtor's ordinary credit requirements. Absent extraordinary circumstances, regularly scheduled payments of interest or principal on these debts do not prefer one creditor over another.[3] A *per se* rule cannot distinguish between ordinary and extraordinary debts and payments based solely on the term of the loan.

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[3] When payments of interest and principal are made according to a schedule agreed on well before the debtor encounters financial difficulty, there is less likelihood that the debtor prefers the creditor when it makes regular payments. Moreover, because the obligation to pay interest arises only when the debtor uses the money, courts have held that regularly scheduled interest obligations are incurred and paid in the ordinary course of the debtor's financial affairs. *See Iowa Premium Serv. Co.* v. *First Nat'l Bank (In re Iowa Premium Serv. Co.)*, 695 F.2d 1109, 1111-12 (8th Cir. 1982).

In contrast, the approach taken by the Court of Appeals for the Sixth Circuit in *Gosch* v. *Burns (In re Finn)*, 909 F.2d 903, 907-08 (6th Cir. 1990), is consistent with the language of section 547(c)(2). There the Court of Appeals stated that, on its face, section 547(c)(2) applies to "all debt incurred 'in the ordinary course'" and was "barren" of any *per se* limits on the type of debt that qualifies for the exemption. *Id.* at 908. The Sixth Circuit rejected the argument that payments on long-term debt cannot be exempted from avoidance and directed that the lower court conduct the factual analysis necessary to determine whether the consumer loan at issue had been incurred in the ordinary course of the debtor's financial affairs. *Id.* The Ninth Circuit's use of a *per se* rule also conflicts with the approach taken by the Tenth Circuit. *See Fidelity Sav. & Inv. Co.* v. *New Hope Baptist*, 880 F.2d 1172 (10th Cir. 1989); *cf. Levit* v. *Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1200 (7th Cir. 1989) (arguing that ordinary, timely payments on long-term debt are exempt under section 547(c)(2) from attack as preferences).

This Court has made clear that the Bankruptcy Code should be applied as written. *See Toibb* v. *Radloff*, 59 U.S.L.W. 4633, 4634 (June 13, 1991); *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Because the plain language of the statute unambiguously makes the exemption depend on whether the payment was in the ordinary course of the borrower's and lender's business and financial affairs, the courts are not at liberty to adopt different, *per se* criteria unrelated to the parties' specific circumstances. *See Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990).

II.

When Congress Eliminated the 45-Day Limit in 1984, It Intended That All Ordinary Course Debt Qualify for the Section 547(c)(2) Exemption.

The sparse legislative history of section 547(c)(2) reflects Congress' intention to leave the determination of whether payments are in the "ordinary course" to a case-by-case analysis, rather than to create artificial categories or a *per se* rule. As originally enacted, section 547(c)(2) applied only to "ordinary course" transfers made within 45 days after the debt was incurred. Bankruptcy Reform Act of 1978, Pub. L. 95-598, § 547(c)(2), 92 Stat. 2549, 2598. Cases interpreting section 547(c)(2) generally turned on whether payments were made within the 45-day period, and not on the nature of the debt. *See, e.g.*, *Sanborn* v. *Bangor Fed. Credit Union (In re Sanborn)*, 29 Bankr. 655 (Bankr. D. Me. 1983); *Kampf* v. *Postal Finance (In re Keeling)*, 11 Bankr. 361 (Bankr. D. Minn. 1981).

The bright line created by the 45-day rule caused creditors to tailor their credit terms—often in commercially inefficient ways—to fall within the exemption. *See Preference Section of the Bankruptcy Code: Hearings on S. 3023 Before the Subcomm. on Judicial Machinery of the Senate Judiciary Comm.*, 96th Cong., 2d Sess. 8-17 (1980). For example, commercial paper was frequently issued with maturities shorter than 45 days to meet concerns about preference risks, even though both borrowers and lenders preferred maturities as long as 270 days. *Id.* at 9. Use of short-term credit to meet longer-term financing needs increased transaction costs, including the cost of redocumenting the credit arrangement every time it was renewed. To avoid these inefficiencies, certain creditor groups

proposed to amend section 547(c)(2) to extend or eliminate the 45-day time limit, or to create new exemptions from avoidance for certain types of credit. *See* DeSimone, *Section 547(c)(2) of the Bankruptcy Code: The Ordinary Course of Business Exception Without the 45 Day Rule*, 20 AKRON L. REV. 95, 130-31 (1986).

When Congress eliminated the 45-day rule in 1984, however, it did not replace it with either a different time limit or an enumeration of specific types of credit qualifying for the ordinary course exemption. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 462, 98 Stat. 333, 378. To protect only short-term credit, Congress could easily have limited the exemption to payments made within nine months or one year of the date the debt was incurred. Instead, Congress declined to specify any time restriction, thereby removing from section 547(c)(2) the only *per se* restriction on the type of ordinary course debt qualifying for the exemption that it had ever contained. *See* Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 776 (1985). Moreover, although Congress was particularly influenced by the effect of the 45-day rule on the commercial paper market,[4] the amendment did not refer to

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[4] The Senate sponsor of the 1984 amendment emphasized that the exemption would apply to commercial paper with a term of more than 45 days because "participants [in the commercial paper market] would presumably be acting in the ordinary course of their business or financial affairs and on the basis of ordinary business terms." Floor Statement on H.R. 5175 (Pub. L. 98-353), 130 CONG. REC. 8887, 8897 (daily ed. June 29, 1984). Although the Clearing House opposes any *per se* rule, the clear inconsistency between the Ninth Circuit's ruling and the intent of Congress is illustrated by the fact that the eight-month maturity rule the Ninth Circuit adopted would

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commercial paper or otherwise limit the types of credit to which the exemption applied.

The legislative history demonstrates that neither trade creditors, nor commercial paper holders, nor short-term lenders generally, are the exclusive beneficiaries of the ordinary course exemption. The legislative history clearly indicates that Congress intended to make the "ordinary course" inquiry a fact-based one. Any lender that meets the ordinary course requirements of section 547(c)(2) based on the circumstances of the specific borrower, lender, indebtedness and payment is entitled to the exemption from avoidance as a preference.

III.

The Wide Variety of Credit Arrangements Requires a Fact-Based Determination of Whether a Debt Was Incurred and Payment Was Made in the Ordinary Course.

The Clearing House member banks provide credit to consumers and businesses utilizing a myriad of terms, structures and forms.[5] Credit in numerous forms is also available from other financial institutions and the public and private capital markets. Payments of principal, interest and fees on all these types of credit are subject to attack as

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[4](...continued)
exclude a significant number of commercial paper issues, which can have a maturity of up to nine months. *See* Securities Act of 1933 § 3(a)(3), 15 U.S.C. § 77c(a)(3) (exemption for commercial paper).

[5] For an introduction to basic loan terms and structures, *see* G. RUTH, COMMERCIAL LENDING 237-288 (2d ed. 1990); M. STIGUM, THE MONEY MARKET 35-64 (3d ed. 1990); G. MUNN & F. GARCIA, ENCYCLOPEDIA OF BANKING AND FINANCE 572-73 (8th ed. 1983).

preferences unless they qualify under the ordinary course or some other exemption. No *per se* rule can categorize all these types of credit as ordinary or extraordinary on any but the most arbitrary basis.

A *per se* rule cannot hope to keep abreast of the rapidly evolving new forms of credit, *see New Financial Products and Techniques 1990*, 678 PRACTISING LAW INST. CORP. SERIES (G.K. Palm ed. 1990); *New Financial Products and Techniques 1989*, 630 PRACTISING LAW INST. CORP. SERIES (G.K. Palm ed. 1989). A *per se* rule will instead cause artificial and inefficient responses to credit requests because lenders will tailor their credit arrangements to fit within the *per se* rule and thereby obtain the benefit of the ordinary course exemption. Lenders will be more likely to extend credit to a financially troubled debtor only on a short-term or fully secured basis, which would severely limit the borrower's ability to obtain additional credit. *Per se* rules based on either the term of the loan or the frequency of borrowing—presumably the standards proposed by the Ninth Circuit—cannot hope to distinguish between ordinary and extraordinary credit arrangements.

The futility of classifying credit facilities according to their types or nominal maturity to determine whether a payment was in the ordinary course can be illustrated by examples of very common credit arrangements.

(1) A toy company has a $5,000,000 revolving credit facility with a three-year term and a provision that any balance outstanding at the end of three years becomes a two-year term loan due in installments. *See generally* S. STERN, STRUCTURING COMMERCIAL LOAN AGREEMENTS 1-4 to 1-9 (2d ed. 1990) (describing revolving credit facilities). During the initial three-year period the toy company may borrow and repay up to $5,000,000 as

frequently as it chooses. Alternatively, it may draw down the full amount and keep it outstanding for the entire three years. In fact, the toy company typically borrows a significant amount under the revolving credit facility only over the holiday season to provide working capital required to finance the gap between the manufacture of the toys and receipt of the proceeds from their sale. In this example, the time between the company's drawings on the credit facility and repayment may vary, with some amounts drawn in each of the months from August through November, and repayments made from January through March.

(2) Two electronics firms obtain revolving credit facilities identical to the toy company's facility. Both immediately draw down the full amount of the facility and keep that amount outstanding for the full five years (three years for the facility and two years for the term loan). One uses the facility to finance a program of acquisitions and the other uses it to finance part of the cost of a new plant.

(3) A builder borrows $5,000,000 under a two-year term loan to finance the construction of houses for resale. While the loan will be outstanding much longer than the seasonal borrowing by the toy maker, it performs the same working capital function for the builder, who uses the proceeds to pay subcontractors and other suppliers.

(4) The toy company obtains a letter of credit providing that the issuing bank will pay the company's suppliers upon submission of written documentation that they have delivered parts to the company. The bank can either reimburse itself from the customer's account or provide for reimbursement in the form of a term loan payable over a period ranging from several months to several years. The letter of credit may be outstanding for a prolonged period,

although reimbursement of any amount drawn on the letter of credit may be required immediately.[6]

(5) A large manufacturing company routinely issues $50,000,000 in commercial paper to provide working capital. Because its access to the commercial paper market could be curtailed due to either a decline in the company's credit standing or a disruption in the commercial paper market, the company obtains a $50,000,000 line of credit to provide a backup to its commercial paper facility. *See generally* 5 V. DiLorenzo, Banking Law 96-133 to 96-134 (1991) (explaining use of back-up line of credit); M. Stigum, The Money Market 1033-36 (3d ed. 1990) (same). If drawn, the loan pursuant to the line of credit may remain outstanding for a year or more. Yet the loan would provide the same working capital financing as the commercial paper facility, which Congress clearly intended to bring within the ordinary course exemption.

As these examples demonstrate, a borrower may utilize different types of credit arrangements to serve the same financing need, and most credit arrangements are designed to provide the borrower with the flexibility to use the funds for many purposes. Borrowers benefit from the resulting price competition between similar products and the availability of credit from different sources. Credit arrangements also usually provide a borrower flexibility as to when to borrow, how much to borrow, and when to repay the debt in whole or in part. *See, e.g.*, G. Ruth, Commercial Lending 237-38 (2d ed. 1990) (discussing the choice of loan structure).

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6 For a discussion of letter of credit arrangements, see J. Dolan, The Law of Letters of Credit (2d ed. 1991); B. McCullough, Letters of Credit (1991).

The specific credit arrangement before the Court demonstrates the arbitrariness inherent in applying a *per se* rule based on the term of the loan. Revolving credit facilities, such as that provided by Petitioner, allow a debtor to borrow and make repayments as credit is needed. The debtor may borrow and repay several times during the term of the facility, each time for a term as short as a single day. If the debtor makes several drawings on the line and repays the loan in several installments, a court would be required to engage in an arbitrary process of matching payments made within the preference period to one or more of the drawings in order to compute the "term" of the loan. Even if a court is able to conclude that a certain period, such as eight months, elapsed between a particular drawing and its repayment, this surely cannot preclude a factual determination that the indebtedness was incurred and repaid in the ordinary course of the debtor's and lender's business or financial affairs.

An additional obstacle to application of a *per se* rule is the fact that many credit arrangements have no single, unchangeable term. As the examples above demonstrate, some credit arrangements are designed to provide both short-term and long-term credit, or to convert short-term credit to long-term credit in certain circumstances. Similarly, a debt may be incurred as short-term credit and subsequently be refinanced to provide a longer maturity or more flexible repayment terms. Nothing about the fact of conversion or refinancing necessarily takes the debt outside of the ordinary course of a debtor's business or financial affairs. In fact, the debt may serve the same credit needs, only over a longer period of time.

In *Gosch* v. *Burns (In re Finn), supra*, for example, the debtor refinanced $3500 in credit card debt as a consumer loan payable over a period of several years. The debtor then

made regular payments of interest and principal. The Sixth Circuit held that "incurring the loan did not increase the borrower's total indebtedness, nor was the loan disproportionate to the borrower's apparent earning power at the time." 909 F.2d at 908. The loan and the payments made under it were no more extraordinary than the credit card balance and payments they replaced.

The Ninth Circuit's approach is especially difficult to apply to the novel types of credit facilities appearing in credit markets. Commercial credit today has terms and structures that the drafters of the 1984 amendment to section 547(c)(2) could not have anticipated. *See New Financial Products and Techniques 1990*, 678 PRACTISING LAW INST. CORP. SERIES (G.K. Palm ed. 1990); *New Financial Products and Techniques 1989*, 630 PRACTISING LAW INST. CORP. SERIES (G.K. Palm ed. 1989). The constant evolution of the forms of credit further demonstrates the wisdom of Congress' decision to leave to the courts the case-by-case determination of whether both newly devised and traditional credit arrangements were established and repaid in the ordinary course. It is plainly arbitrary to attempt to categorize credit facilities for purposes of the ordinary course exemption by looking to either the facility's nominal maturity or the label placed on it. Only a review of the circumstances surrounding the debt, the challenged payment and the lender's and debtor's "business and financial affairs" will show whether or not the payment qualifies for the section 547(c)(2) exemption.

IV.

The Policies Underlying the Preference Provisions Argue Against Any Categorization of Types of Credit To Determine "Ordinary Course" Status.

Two policies central to bankruptcy law—equitable distribution of the debtor's assets and preservation of the debtor's estate—underlie the preference section. A rule that excludes whole categories of debt from the protection of section 547(c)(2) is inconsistent with both these policies.

A. Equitable Distribution of the Debtor's Assets.

Equitable distribution of the value of the debtor's assets among its creditors is a fundamental goal of both the Bankruptcy Code in general and the preference rules in particular. H.R. REP. NO. 595, 95th Cong., 1st Sess. 177-78, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6138. The Bankruptcy Code seeks to ensure that the proceeds of the estate are distributed according to priorities set out in the Code and state commercial law. The preference provisions prevent individual creditors from obtaining full payment of their claims immediately before bankruptcy while similarly situated creditors receive a fraction of their claims in the bankruptcy case.

Excluding long-term debt payments from the protection of section 547(c)(2) is inconsistent with the goal of equitable distribution. Such a *per se* rule in effect prefers the judicially defined class of "short-term creditors" at the expense of "long-term creditors" on the basis of what may be nothing more than arbitrary labeling. Moreover, the distinction between short-term credit and long-term credit frequently does not exist for a financially troubled company. Short-term credit such as trade credit and commercial paper often

substitutes for long-term credit when it is regularly renewed. Similarly, long-term credit becomes in effect short-term credit when a debtor experiences financial difficulty and violates covenants in a loan agreement that authorize acceleration of the loan. In both cases, the creditor can choose to permit further use of its credit or to withdraw the credit, and thereby hasten the debtor's descent into bankruptcy.

If a long-term creditor proves that the loan was extended, and that repayments during the preference period were made, in the ordinary course of the debtor's and lender's business or financial affairs, then those payments should be exempted from avoidance under section 547(c)(2). To hold otherwise is to penalize the long-term creditor for the benefit of short-term creditors, creating an inequitable distribution of the sort the Bankruptcy Code seeks to prevent.

B. Preservation of the Debtor's Estate.

The exemptions from the general preference provisions serve the second fundamental policy of bankruptcy law: to preserve the debtor's estate by discouraging creditors from dismembering the business of a faltering debtor prior to bankruptcy. The exemptions are designed to create incentives for creditors to refrain from engaging in a "race of diligence" to obtain more value than will be available once a bankruptcy petition is filed, thus protecting debtors from being stampeded into unnecessary bankruptcy. H.R. REP. NO. 595, 95th Cong., 1st Sess. 177, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6138; DeSimone, *Section 547(c)(2) of the Bankruptcy Code: The Ordinary Course of Business Exception Without the 45 Day Rule*, 20 AKRON L. REV. 95, 99 (1986).

To further the policy of preserving the debtor's estate, the same incentive to continue to provide credit must be offered to the long-term creditor as is offered to the short-term creditor. To deny long-term creditors the protection of section 547(c)(2) encourages long-term creditors to accelerate repayment on outstanding debts—the very action the preference law seeks to discourage—in order to avoid having payments fall within the preference period preceding the bankruptcy. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 177, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6138. Alternatively, without the protection of section 547(c)(2), a long-term creditor may decide to force the debtor into bankruptcy before the debtor's assets are depleted by non-recoverable payments made to short-term creditors who are protected by the "ordinary course" exemption.

The aims of the preference provisions cannot be achieved through the creation and mechanical use of *per se* rules to create categories of debt that fall within or outside of the "ordinary course" exemption, without any analysis of the particular debtor's "business or financial affairs." Rather, section 547(c)(2) requires a case-by-case determination whether, in light of the policies underlying the preference rules and the particular debtor's business and financial affairs, the indebtedness at issue was incurred and repaid in the "ordinary course."

Conclusion

For the reasons stated herein, The New York Clearing House Association urges that this Court reverse the judgment of the Court of Appeals for the Ninth Circuit.

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